

MARATHON OIL CO.

IBLA 97-129

Decided June 29, 1999

Appeal from a decision of the Deputy Commissioner of Indian Affairs, Bureau of Indian Affairs, denying an appeal of an order of the Minerals Management Service requiring recalculation of royalties due on Indian leases using dual accounting. MMS-91-0269-IND.

Affirmed.

1. Federal Oil and Gas Royalty Management Act of 1982:
Royalties--Indians: Mineral Resources: Oil and Gas:
Royalties--Oil and Gas Leases: Royalties:
Generally--Statute of Limitations

The 6-year statute of limitations at 28 U.S.C.
§ 2415(a) (1994) for the commencement of civil
actions for money damages on behalf of the United
States does not limit administrative proceedings
within the Department of the Interior.

2. Federal Oil and Gas Royalty Management Act of 1982:
Royalties--Indians: Mineral Resources: Oil and Gas:
Royalties--Oil and Gas Leases: Royalties: Payments

MMS properly directs a lessee to perform dual
accounting and recalculate royalties due on Indian oil
and gas leases where the leases require such accounting
and an MMS audit revealed instances of the lessee's
failure to calculate and pay royalties utilizing that
method.

APPEARANCES: Dow L. Campbell, Esq., Findlay, Ohio, for Marathon Oil
Company; Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department
of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Marathon Oil Company (Marathon) has appealed the August 8, 1996,
decision of the Deputy Commissioner of Indian Affairs, Bureau of Indian
Affairs (BIA), denying its appeal of a June 19, 1991, order of the
Minerals Management Service (MMS), directing it to perform dual accounting
and recalculate royalties for all TXO Production Company (TXO) Indian oil
and gas leases for the period July 1983 to June 1991. TXO merged into
Marathon on January 1, 1991.

In a preliminary letter dated April 9, 1991, MMS informed Marathon that its audit of TXO's procedures relating to the computation and payment of royalties on oil and gas produced from Federal and Indian leases during the period July 1983 through June 1988 had uncovered several specific instances of underpaid royalties on Indian leases stemming from TXO's failure to perform dual accounting. While noting that during its review TXO had not offered any documentation showing that the royalties paid had, in fact, been based on dual accounting, MMS granted Marathon 15 days to respond to the preliminary findings of potential royalty underpayments.

Marathon did not respond, and on June 19, 1991, MMS issued an order directing Marathon to identify all Indian leases for which TXO held payor responsibility during the period July 1983 through the present, i.e., June 19, 1991, and to redetermine the royalty due for all the identified Indian leases requiring dual accounting during that period. MMS stated that section 3(c) of the Indian leases, applicable regulations found at 30 C.F.R. § 206.105 (1985), 30 C.F.R. § 206.155(a) (1988), 25 C.F.R. § 211.13 (1987), and 25 C.F.R. § 212.16 (1988), Notice to Lessees and Operators of Indian Oil and Gas Leases 1A (NTL-1A), 42 Fed. Reg. 18135 (Apr. 5, 1977), and relevant case law required the use of dual accounting to compute royalty on gas produced on Indian leases and processed either by the lessee or a purchaser. The order explained that dual accounting required the lessee to compare the value of the unprocessed wet gas at the wellhead (the Btu valuation method) with the value of the residue gas and processed gas liquids (the net realization valuation method) and calculate and pay monthly royalties based on the method yielding the greater value, as long as that value exceeded the gross proceeds accruing to the lessee. MMS noted that its review had discovered a \$2,125.84 royalty underpayment on four Indian leases caused by TXO's failure to perform dual accounting, adding that neither TXO nor Marathon had provided any documentation demonstrating that the royalties paid had been based on dual accounting.

Marathon appealed the MMS order to the Deputy Commissioner, BIA, arguing that the 6-year statute of limitations found at 28 U.S.C. § 2415 (1994) barred a portion of MMS' order, that MMS did not have the authority to order a Federal oil and gas lessee to conduct a self-audit, that the Btu content of gas produced from many of the Indian leases was too low to have produced liquids, that TXO had performed some dual accounting, that the cited lease provision and two of the regulations purportedly authorizing dual accounting were all inapplicable in some respect, and that Marathon's royalty accounting practices did not necessarily coincide with TXO's methods. Marathon also advised the Deputy Commissioner that the dual accounting issues affecting many of the leases covered by the MMS order had been settled and thus were no longer subject to the challenged order. In its field report prepared for the appeal, MMS agreed that 52 Oklahoma allotted leases had been included in the settlement and were properly excluded from its order, but strenuously disputed the remainder of Marathon's objections to the order.

In her August 8, 1996, decision, the Deputy Commissioner first rejected Marathon's contention that the statute of limitations barred MMS'

order, finding that the limitations period did not apply to administrative proceedings before the Department. She further concluded that, Marathon's assertion to the contrary notwithstanding, MMS' order did not require Marathon to perform a self-audit, but simply directed Marathon to remedy the pattern of noncompliance uncovered in the completed audit by taking corrective action in the form of a revised or restructured accounting to remedy the discovered irregularities. She dismissed Marathon's argument that some of the produced gas was too dry to produce significant quantities of liquids, pointing out that MMS' order required dual accounting only for processed gas, not unprocessed gas.

As to Marathon's claim that TXO had carried out some dual accounting and therefore had at least partially complied with the order, the Deputy Commissioner noted that no information regarding TXO's dual accounting had been submitted to MMS until Marathon filed its statement of reasons in this appeal which included six dual accounting calculations as an attachment. She determined that this belated, minimal response, consisting of computations for one Federal lease for three reporting months and three Indian leases for one reporting month, was insufficient to constitute substantial compliance with the order or to justify rescinding the order. The Deputy Commissioner found Marathon's objections to the legal bases for MMS' dual accounting order unpersuasive because Marathon had overlooked the additional authorities underpinning MMS' order, including court precedent, NTL-1A, and Indian oil and gas royalty valuation regulations. She also discounted Marathon's complaint that TXO's accounting errors did not justify requiring Marathon to perform a restructured accounting of the leases for the period after it had become the lessee, observing that the ordered restructured accounting was specifically limited to the period during which TXO held payor responsibility. The Deputy Commissioner therefore denied Marathon's appeal, except for the 52 Oklahoma allotted Indian leases which had been previously settled and, thus, no longer subject to the June 19, 1991, MMS order.

On appeal, Marathon argues that the royalty payments that were due on or before March 26, 1985, i.e., 6 years and 90 days before it received the June 19, 1991, order, are barred by the statute of limitations found at 28 U.S.C. § 2415 (1994). As support for the applicability of that limitations period to MMS administrative orders, Marathon cites Phillips Petroleum Co. v. Lujan, 4 F.3d 858 (10th Cir. 1993), and OXY USA Inc. and Mobil Exploration & Producing U.S. Inc. v. Babbitt, No. 96-C-1067-K (N.D. Okla. Sept. 8, 1998) (characterizing the discussion of the 6-year statute limitations in Phillips Petroleum Co. v. Lujan as binding 10th Circuit precedent). Marathon also asserts that MMS does not have the authority to order an oil and gas lessee to conduct a self-audit, and that, in any event, TXO partially complied with the dual accounting requirements, thus rendering MMS' complaint in this regard one of form over substance. Marathon submits that as long as the lessee pays royalties based on the higher of the value of the unprocessed wet gas or the residue gas and produced liquids, the dual accounting requirement in Indian oil and gas leases has been satisfied. According to Marathon, compliance with the

lease terms renders moot the question of whether or not worksheets documenting that compliance have been prepared. Marathon contends that the critical issue is not the worksheets but whether TXO made royalty payments based on the higher value. It avers that MMS has failed to sustain its burden of proving that royalties were calculated using the lower value, and that the decision should therefore be vacated as to this claim. 1/

In response, MMS argues that the Deputy Commissioner's decision must be affirmed because Marathon concedes that TXO did not dual account in all cases. This concession is fatal, MMS submits, not only because dual accounting is required on all Indian leases containing such a provision, but also because, absent dual accounting, the critical question of whether TXO paid royalties on the higher value cannot be ascertained. MMS further contends that it properly directed Marathon to conduct a restructured accounting since the record, including Marathon's admission that TXO did not dual account in all cases, establishes a systemic error in TXO's royalty calculations and payments warranting correction. MMS also insists that the statute of limitations does not apply to administrative proceedings and thus does not bar affirmance of the Deputy Commissioner's decision and MMS' order.

[1] As an initial matter, we reject Marathon's contention that the 6-year Federal statute of limitations, 28 U.S.C. § 2415(a) (1994), precludes the MMS demand for dual accounting. That section, which governs the time for commencing judicial actions brought by the United States, provides in part:

Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

28 U.S.C. § 2415(a) (1994). This Board has held numerous times that statutes establishing time limits for the commencement of judicial actions for damages on behalf of the United States do not limit administrative proceedings within the Department of the Interior conducted to determine liability and fix the amount the Government claims to be due. See, e.g., Benson-Montin-Greer Drilling Corp., 146 IBLA 387, 397 (1998); Santa Fe Minerals, Inc., 145 IBLA 317, 323 (1998); Cenex, Inc., 145 IBLA 254, 257 (1998); U.S. Oil and Refining Co., 137 IBLA 223, 230 (1996), and cases cited.

1/ By order dated Jan. 29, 1997, the Board took Marathon's requests for a hearing and oral argument under advisement. Because we find the record sufficient to resolve the issues raised in this appeal, we deny both requests.

A demand for the recalculation of royalties for Indian oil and gas leases using dual accounting is not a judicial action for money damages brought by the United States, but is an administrative action not subject to the statute of limitations. Benson-Montin-Greer Drilling Corp., *supra*; see S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1, 5 (Fed. Cir. 1985); Chevron U.S.A., Inc., 129 IBLA 151, 154 (1994); Alaska Statebank, 111 IBLA 300, 311-12 (1989). As the U.S. Court of Appeals for the Fifth Circuit stated in a September 7, 1994, order granting rehearing of its opinion in Phillips Petroleum Co. v. Johnson, 22 F.3d 616 (5th Cir. 1994), and affirming the district court's grant of summary judgment to the defendants in two of four consolidated cases:

The term "action for money damages" refers to a suit in court seeking compensatory damages. The plain meaning of the statute bars "every action for money damages" unless "the complaint is filed within six years." (Emphasis added.) Thus, actions for money damages are commenced by filing a complaint. Actions that do not involve the filing of a complaint are not "action[s] for money damages." Since the government has filed no complaint, the agency action is not "a[n] action for money damages." Thus, [28 U.S.C.] § 2415 is no bar.

(Order at 3-4, quoted in Texaco Exploration and Production, Inc., 134 IBLA 267, 270-71 (1995).)

Phillips Petroleum Co. v. Lujan, 4 F.3d 858 (10th Cir. 1993), cited by Marathon does not necessarily hold to the contrary. That court noted that "[t]he parties agree that 28 U.S.C. § 2415(a) is the applicable statute for determining when the government must commence its action to collect the royalty underpayment." *Id.* at 860. The pending appeal is an administrative action seeking recalculation of royalties using dual accounting, not an action to collect royalty underpayments, and under the authorities cited above is not subject to the statute of limitations. See Amoco Production Co., 144 IBLA 135, 139-40 (1998); Meridian Oil, Inc., 140 IBLA 135, 145-46 (1997).

Even if this decision might be construed as sustaining the application of the statute to administrative proceedings, this Board has expressly declined to follow isolated decisions of Federal courts in limited circumstances even while recognizing that such a decision is the law of the case. See, e.g., Amoco Production Co., 144 IBLA at 140; Conoco, Inc., 114 IBLA 28, 32 (1990); Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186, 190 (1984); Gretchen Capital, Ltd., 37 IBLA 392, 395 (1978). The Board has eschewed following Federal court decisions primarily in those situations where the effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a differing conclusion. Amoco Production Co., *supra*. We find those conditions present here, especially in light of the Fifth Circuit's contrary conclusion on rehearing in Phillips Petroleum Co. v. Johnson, cited above.

We are without authority to decide whether the statute of limitations would bar a judicial suit to collect any underpayments resulting from the ordered dual accounting; such a determination would be made by the court before which any collection proceeding is brought. Benson-Montin-Greer Drilling Corp., 146 IBLA at 398; Cenex, Inc., *supra*; U.S. Oil & Refining Co., 137 IBLA at 231; Texaco, Inc., 134 IBLA at 117; Marathon Oil Co., 119 IBLA 345, 352 (1991); Alaska Statebank, 111 IBLA at 312; see also Phillips Petroleum Co. v. Lujan, 951 F.2d 257, 259-60 (10th Cir. 1991). None of Marathon's arguments persuades us that the 6-year limitation period in 28 U.S.C. § 2415(a) (1994) should be read expansively to apply to administrative proceedings, and we, therefore, hold that 28 U.S.C. § 2415(a) (1994) does not prevent MMS from requiring Marathon to perform dual accounting and recalculate royalties for all TXO Indian oil and gas leases for the period July 1983 to June 1991.

[2] Section 101(c)(1) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. § 1711(c)(1) (1994), requires the Secretary of the Interior and his designated delegates to "audit and reconcile, to the extent practicable, all current and past lease accounts for leases of oil or gas." See also 30 C.F.R. § 217.50. In enacting FOGRMA, Congress clearly sought to avoid a royalty accounting and collection system operating entirely on the honor principle, with no verification of production and sales data, since this sort of arrangement had led to underreporting of production and sales in the past. See H.R. Rep. No. 859, 97th Cong., 2d Sess. 15, 16 (1982), reprinted in 1982 U.S.C.C.A.N. 4269-70.

Instead, the statute required the Secretary and his delegates to audit and reconcile lease accounts. Congress, however, was also aware that "auditing every account on an annual basis is clearly impractical." H.R. Rep. No. 859, 97th Cong., 2d Sess. 33 (1982), reprinted in 1982 U.S.C.C.A.N. 4287. With this practical consideration in mind, the Secretary was to audit and reconcile accounts only "to the extent practicable." 30 U.S.C. § 1711(c)(1) (1994). See Texaco Inc., 138 IBLA 26, 28-29 (1997); Texaco Exploration & Production, Inc., 134 IBLA 267, 269 (1995).

In BHP Petroleum (Americas) Inc., 124 IBLA 185, 187 (1992), we held that FOGRMA does not restrain the Secretary from directing a royalty payor to review royalty accounts in order to unearth underpayments traceable to an identified defect in the payor's original computation of royalties due.

We also approved MMS' practice of sampling certain leases or production months, leaving the payor the burden of uncovering all other instances of systemic deficiency. *Id.* at 188; see also Texaco Inc., 138 IBLA at 29; Texaco Exploration & Production, Inc., 134 IBLA at 269-70; Amoco Production Co., 123 IBLA 278, 281-84 (1992). Furthermore, the court in Phillips Petroleum Co. v. Lujan, 963 F.2d 1380, 1386 (10th Cir. 1992), specifically rejected the argument that MMS had required Phillips to perform an impermissible "self-audit" in contravention of FOGRMA and approved MMS' procedure of requiring lessees to correct repeated royalty underpayments caused by systemic deficiencies, finding that such a request "falls squarely within the purposes of the FOGRMA." *Id.*

In this case, MMS' review of TXO's leases uncovered evidence that TXO had failed to perform the dual accounting required by the terms of its Indian leases, applicable case law and regulations, and NTL-1A, leading to the underpayment of royalties on several identified leases. TXO did not provide any documentation showing that royalties had been paid based on dual accounting during the course of the review, and Marathon has conceded that TXO did not perform dual accounting in all cases. The sparse workpapers submitted by Marathon on appeal evincing TXO's partial compliance with the dual accounting requirement are insufficient to establish that TXO performed dual accounting on all its Indian leases. Thus, the record amply supports MMS' finding of a systemic error in TXO's royalty calculations and payments and justifies the demand for dual accounting and royalty recalculation.

Although Marathon contends that the workpapers reflecting the dual accounting comparisons are irrelevant to the determination of whether TXO properly paid royalty based on the higher value for the produced gas, we agree with MMS that, without documentation showing the dual accounting calculations, it would be impossible to determine whether the correct royalties were paid. In any event, FOGPMA authorizes MMS to require Marathon to submit workpapers demonstrating compliance with the recalculation order. That statute provides that MMS may, in conducting "any investigation * * * require by special * * * order, any person to submit in writing such * * * answers to questions as [MMS] may reasonably prescribe." 30 U.S.C. § 1717(a)(1) (1994). See Texaco Inc., supra. The purpose of FOGPMA was to enhance and expand the investigatory powers of the Secretary and MMS, and MMS accordingly has the authority to require the preparation and submission of documents evidencing conformity with the recalculation demand. See Texaco Inc., supra; see also Phillips Petroleum Co. v. Lujan, 951 F.2d at 260; BHP Petroleum (Americas) Inc., 124 IBLA at 189.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

David L. Hughes
Administrative Judge